Filed 4/8/19 P. v. Garcia CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FERNANDO GARCIA, Defendant and Appellant.	E071330 (Super.Ct.No. RIF1604169) OPINION

APPEAL from the Superior Court of Riverside County. John D. Molloy, Judge. Affirmed.

Fernando Garcia, in pro. per.; and Erica Gambale, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

The court, on remand for resentencing from this court, imposed, but stayed sentence on a personal use of a deadly weapon enhancement. (Pen. Code, §§ 12022,

subd. (b)(1), 1192.7, subd. (c)(23)).[1] After defendant and appellant, Fernando Garcia, filed an appeal, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, setting forth a statement of the case, a statement of the facts, and identifying one potentially arguable issue: whether the court erred in exercising its discretion on remand.

Defendant was offered the opportunity to file a personal supplemental brief, which he has done. Defendant attacks the underlying judgment. He maintains that, with respect to the prior strike conviction which he admitted, the People committed *Brady*[2] violations, there were due process errors, and defendant was misled into admitting the prior strike conviction which had actually been dismissed. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Pursuant to a plea to the court, defendant pled guilty to felony vandalism (count 1; § 594, subd. (b)(1)) and unlawfully challenging a person to fight in public, a misdemeanor (count 2; § 415, cl. (1)). Defendant additionally admitted he personally used a dangerous weapon in his commission of the count 1 offense (§§ 12022, subd. (b)(1), 1192.7, subd. (c)(23)), suffered two prior prison terms (§ 667.5, subd. (b)), and

---

[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] *Brady v. Maryland* (1963) 373 U.S. 83.

suffered a prior strike conviction (§§ 667, subds. (c), (e)(2)(A), 1170.12, subd. (c)(2)(A)). The court sentenced defendant to an aggregate term of imprisonment of nine years.[3]

On December 8, 2016, defense counsel filed a *Romero*[4] motion requesting the court to strike both prior strike convictions. In the motion, defense counsel noted that defendant "was 15 and 16 years old, respectively," at the time of his prior strike convictions. On December 13, 2016, the People filed opposition to the motion. In it, the People noted defendant's first prior strike conviction occurred on March 17, 1993. On December 20, 2016, the court granted the *Romero* motion as to the latter prior strike conviction, the one occurring in 1994.[5]

On appeal from his conviction, defendant's appointed counsel contended the court erroneously believed it lacked discretion to strike the personal use of a weapon enhancement. In an opinion filed on May 8, 2018, we reversed and remanded for resentencing by the court in full awareness of its discretion as to whether to strike the personal use enhancement.

---

[3] On March 8, 2019, we granted defense counsel's request for judicial notice of the record in defendant's previous appeal, case No. E067607.

[4] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

[5] It is apparent from the record that the court's partial grant of defendant's *Romero* motion was part of its indicated sentence should defendant agree to plead to the court; defendant's plea agreement reflects the admission of only one of the prior strike convictions.

On July 9, 2018, and August 3, 2018, defendant filed petitions for writ of habeas corpus in this court,[6] in which he, in part, alleged that the 1993 prior strike conviction enhancement was legally invalid because it occurred when he was 15 years old and because defendant did not, in fact, suffer any conviction for the offense for which he was arrested in 1993.[7] (§ 1170.12, subd. (b)(3)(A) [a prior juvenile adjudication shall constitute a prior serious and/or violent felony conviction for the purposes of sentence enhancement only if the juvenile was 16 years of age or older at the time he or she committed the prior offense]; see *People v. Garcia* (1999) 21 Cal.4th 1, 12-13 [prior juvenile adjudication cannot be used as a strike unless age requirement is met].)

On August 16, 2018, we summarily denied defendant's petition in case No. E071032. On the same date in case No. E070840, we requested an informal response from the People addressing whether defendant's age at the time of the offense invalidated his 1993 strike enhancement.

On August 23, 2018, at the hearing on remand from this court's opinion in case No. E067607, the court stayed imposition of the personal use of a dangerous weapon

---

[6] We assigned the petitions appellate court case Nos. E070840 and E071032, respectively. We take judicial notice of the petitions. (Evid. Code, § 459.)

[7] Defendant alleged he suffered only an arrest and charge in 1993 which was subsequently dismissed. The juvenile petition filed on March 19, 1993, reflects that defendant was 16 years old when he committed the prior strike offense for assault with a handgun on March 6, 1993, for which his sentence was enhanced; however, that date of birth was apparently based upon the false name defendant gave when he was arrested. A minute order dated June 9, 1993, reflecting that the juvenile court found the allegation in the petition untrue, shows defendant's date of birth as April 9, 1977, which would make defendant 15 years old at the time he allegedly committed the offense.

enhancement, reducing defendant's sentence from nine to eight years of incarceration. The People filed their response to defendant's petition in case No. E070840 on August 29, 2018. Defendant filed a reply on October 12, 2018. On October 22, 2018, we summarily denied defendant's petition in case No. E070840.[8]

II. DISCUSSION

Defendant contends the prior strike conviction enhancement must be stricken since he was only 15 years old when he allegedly committed the offense and because he was never actually convicted of the offense. We disagree.

First, defendant's appeal is from the resentencing order, not the original judgment. Defendant forfeited the argument that his prior "conviction" could not be used to enhance his sentence by not raising it at the original sentencing hearing, not raising it on his first appeal, and not raising it at the resentencing hearing. "California law prohibits a direct attack upon a conviction in a second appeal after a limited remand for resentencing or other posttrial procedures . . . ." (*People v. Senior* (1995) 33 Cal.App.4th 531, 535, 538 ["[W]here a criminal defendant could have raised an issue in a prior appeal, the appellate court need not entertain the issue in a subsequent appeal absent a showing of justification for the delay."]; see *In re Harris* (1993) 5 Cal.4th 813, 829 ["Proper appellate procedure

[8] Defendant argues this court was required, pursuant to California Rules of Court, rule 8.385(c), to deny his petition by opinion, or at least append a notation that the denial was "without prejudice." Defendant is incorrect. A summary denial without prejudice is required only where the petition was filed in the wrong court. (Cal. Rules of Court, rule 8.385(c)(1), (3).) Defendant's petition was filed in the appropriate court and was denied on the merits.

thus demands that, absent strong justification, issues that could be raised on appeal must initially be so presented . . . ."].) Indeed, during the pendency of the hearing on remand, appellate counsel expressly told defendant to raise the issue at his resentencing hearing, yet defendant did not do so.

Second, even if we were to find that defendant had shown sufficient justification for delay in raising the issue, we would be precluded from finding in defendant's favor. Where a defendant has pleaded guilty in return for a specified sentence, appellate courts will not find error unless the trial court lacked *fundamental* jurisdiction. (*People v. Hester* (2000) 22 Cal.4th 290, 295.) "The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process." (*Ibid*.) Further, "'[w]hen a defendant maintains that the trial court's sentence violates rules which would have required the imposition of a more lenient sentence, yet the defendant avoided a potentially harsher sentence by entering into the plea bargain, it may be implied that the defendant waived any rights under such rules by choosing to accept the plea bargain.'" (*Ibid*.)

Third and finally, any error is harmless. Defendant's recourse for an invalid sentence would be to rescind the plea agreement. (See *People v. Superior Court* (*Sanchez*) (2014) 223 Cal.App.4th 567, 573.) Should that occur, the People could reinstate the stricken 1994 strike offense and use it in place of the invalid 1993 offense. Thus, defendant cannot show a reasonable probability that but for the error, the result

would have been different. (*People v. Hester*, *supra*, 22 Cal.4th at p. 297.) Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the record for potential error and find no arguable issues.

III. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
J.

We concur:

RAMIREZ
P. J.

SLOUGH
J.